

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **JUL 26 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nitino
for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

The petitioner describes itself as a frozen yogurt retail business. It seeks to permanently employ the beneficiary in the United States as an industrial engineer. The petitioner requests classification of the beneficiary as an advanced degree professional or an alien of exceptional ability pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the record did not establish that the petitioner had the ability to pay the proffered wage as of the priority date. He denied the Form I-140 petition, Immigrant Petition for Alien Worker, accordingly.

The record shows that the appeal is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On May 31, 2013, the AAO sent the petitioner a Notice of Intent to Dismiss (NOID) and Notice of Derogatory Information (NDI), with a copy to counsel of record. In the NOID and NDI, the AAO informed the petitioner that the record contained a May 10, 2011 statement from [REDACTED] Vice President of [REDACTED], which had been submitted in support of an earlier Form I-140 petition filed by another petitioner and which contradicted the experience claimed by the beneficiary on the instant ETA Form 9089, Application for Permanent Employment Certification. The AAO indicated that it found the May 10, 2011 statement to support a finding that the beneficiary had submitted fraudulent documentation to United States Citizenship and Immigration Services (USCIS) and to DOL in the labor certification process. The AAO allowed the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond would result in the dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to the AAO's NOID and NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Since the petitioner failed to respond to the NOID, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO also indicated in the NOID and NDI that absent the petitioner's submission of independent objective evidence to overcome its findings, it intended to enter a finding of material misrepresentation pursuant to section 212(a)(6)(C)(i) of the Act and to invalidate the ETA Form 9089 under the regulation at 20 C.F.R. § 656.30(d).

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 C.F.R. § 1182(a)(6)(C)(i), where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act."

The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Upon a finding of willful misrepresentation or fraud pursuant to section 212(a)(6)(C)(i) of the Act, USCIS may invalidate a labor certification previously approved by DOL under the regulation at 20 C.F.R. § 656.30(d), which provides:

(d) **Invalidation of labor certifications.** After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires the petitioner to demonstrate that the beneficiary meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C).

The offered position requires the beneficiary to have five years of experience in the job offered and the beneficiary claimed on the ETA Form 9089 to have gained the required experience based on his employment as director of engineering for [REDACTED] (South Korea) from February 28, 1991 until August 31, 2004 and [REDACTED] from September 1, 2004 until August 31, 2007. The beneficiary signed the labor certification under a declaration that the contents were true and correct under penalty of perjury.

However, the previously referenced May 10, 2011 statement from [REDACTED] Vice President of [REDACTED] contradicts the beneficiary's claims of having worked as a director of engineering for [REDACTED] and [REDACTED]. It indicates that the beneficiary was, instead, employed by [REDACTED] as a marketing representative and by [REDACTED] as a marketing director.² Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In that the petitioner has provided no independent, objective evidence to resolve the inconsistent employment history outlined in the NOID and NDI issued on May 31, 2013, the AAO finds the beneficiary's claims of experience on the ETA Form 9089 to constitute an act of willful misrepresentation pursuant to section 212(a)(6)(C)(i) of the Act. The listing of such experience misrepresented the beneficiary's actual qualifications in a willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the listing of false experience on the ETA Form 9089 is a willful misrepresentation of the beneficiary's qualifications that adversely impacted DOL's adjudication of the ETA 750 and USCIS's immigrant visa petition analysis. Accordingly, the AAO finds the beneficiary to have sought to procure a benefit under Act through the willful misrepresentation of a material fact. This finding of material misrepresentation shall be considered in any future proceeding where inadmissibility is an issue. Based on its finding of material misrepresentation, the AAO also invalidates the approval of the ETA Form 9089 pursuant to 20 C.F.R. § 656.30(d).

For the reasons previously discussed, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i), the beneficiary will be found to have willfully misrepresented a material fact in attempting to obtain a benefit under the Act, and the ETA Form 9089 will be invalidated.

² The employment information provided in the statement is consistent with that reflected on the ETA Form 9089 underlying the prior Form I-140 petition filed on behalf of the beneficiary by another petitioner.

(b)(6)

NON-PRECEDENT DECISION

Page 5

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the beneficiary knowingly misrepresented a material fact in an effort to procure a benefit under the Act and implementing regulations. The ETA Form 9089, ETA case number A-12081-48047, filed by the petitioner, is invalidated.